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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DAO VAN VY, Defendant and Appellant.	H025873 (Santa Clara County Super.Ct.No. CC092402)

Defendant Dao Van Vy (age 16) was a member of a small Vietnamese gang in San Jose. He and five other young males attacked a single unarmed male in a parking lot in broad daylight after the victim claimed membership in a rival gang. Defendant—who was the only armed assailant and the only one hiding his identity by pulling a stocking over his face—stabbed the victim with a knife several times in the chest and stomach. The victim suffered massive injuries but survived due to extraordinary medical intervention.

Defendant was convicted of attempted murder (Pen. Code, §§ 664, subd. (a)/187/189) for his lead role in the brutal attack (count 1).[1] The jury also found true two enhancements: (1) the crime was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)); and (2) defendant's attempt to murder the victim was willful,

* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts III through VIII, inclusive.

[1] All further statutory references are to the Penal Code unless otherwise noted.

deliberate, and premeditated (§§ 189, 664, subd. (a)). Defendant was also convicted of assault (§ 240) in connection with a later attack on another Vietnamese youth that occurred in Juvenile Hall (count 2).

Defendant appeals, challenging the conviction as to count 1, only. In the published portion of the opinion, we address defendant's two claims of error concerning the gang enhancement. On the first issue, we conclude that three violent assaults by defendant's gang (including the attack on the victim) over less than a three-month period constituted sufficient evidence that the commission of such predicate crimes was one of the "primary activities" of defendant's gang. (§ 186.22, subd. (f); hereafter § 186.22(f).) Second, we find that the trial court did not commit instructional error by including attempted murder as a predicate crime that the jury could consider for the "primary activities" prong of the gang enhancement. In the unpublished portion of the opinion, we address defendant's claims of various instructional error, abuse of discretion by the court in its denial of defendant's motion under section 1385 to strike the willful, deliberate, and premeditated enhancement, and error in ordering defendant to pay $5,000 in attorney's fees under section 987.8.

We reject defendant's challenges on appeal, save for the order of attorney's fees. Except for striking the attorney's fees order, we therefore affirm the judgment.

FACTS

We present a summary of the evidence from the trial utilizing the applicable standard; we resolve factual conflicts in support of the verdict. (*People v. Holt* (1997) 15 Cal.4th 619, 667-668.) In addition, since none of the challenges on appeal concerns the assault conviction (count 2),[2] our summary includes only the evidence pertaining to the attempted murder conviction (count 1).

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[2] Defendant was charged with assault with a deadly weapon (§ 245, subd. (a)(1)) in connection with a February 16, 2001 incident at Juvenile Hall involving Nguyen N. Defendant attacked the victim in a common eating area, striking him repeatedly in the

I. *Introduction*

The prosecution asserted that the May 27, 2000 stabbing of the victim, Kiet Nguyen, charged in count 1 arose out of a conflict between two Vietnamese street gangs. In an aid to understanding the evidence, we identify briefly the relevant gangs and their participants:

Young Asians: Gang members included defendant, Tai N., Tu N., and Kim V. Friends of the gang included Lili H. (Kim's girlfriend), Andy N., and Thai P. (Andy N.'s ex-girlfriend).

Kings of the Night: Gang members included Kiet Nguyen (the victim), Huy L., and Dien L. Friends of the gang included Thai P. (Huy's girlfriend).

Viet Killers: Rival gang of YA, and a gang friendly with KON.

II. *Prosecution Witnesses*

A. *Kiet Nguyen*

Kiet Nguyen was 20 years old at the time of the attack. Until shortly before the incident, he was a member of the Vietnamese gang, Kings of the Night (KON), which he cofounded in 1998. He had a "KON" tattoo on his arm to indicate his affiliation with the KON gang. Between 1998 and 2000, Kiet was involved with KON in fights with rival gangs, where KON was sometimes the aggressor and where weapons were sometimes used.

Kiet first became aware of the Young Asians (YA) Vietnamese gang in 1998, and he knew that defendant was one of its members. When Kiet first met defendant in 1998, there were no problems between KON and YA. About one year before the May 2000 attack, KON confronted YA near a high school; KON "checked" YA (i.e., challenged

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back with both fists clenched. Shortly after the two youths were separated, a counselor found a sharpened object (toothbrush) close to the scene of the attack. The victim was not seriously injured.

YA to a fight), and YA backed down. The YA members involved in this incident were defendant, Tai N., and one other person.

Kiet was also familiar with the Viet Killers (VK) gang. In 1999 and early 2000, KON and VK were "clicking" (were friendly and hung out together). Kiet testified that if a gang that was a rival of KON "clicked" with a third gang, KON would perceive the third gang to be its rival as well.

There were problems between YA and VK approximately one month before the May 2000 stabbing incident. There was also a confrontation between KON and YA at a coffee shop about two weeks before Kiet was stabbed.

In the early afternoon of May 27, 2000, Kiet went to the Dao Hong coffee shop in San Jose with his friend and former KON member, Huy L. They were accompanied by Thai P. (Huy's girlfriend), and Lili H. Their group sat at one table in the cafe.

After about 10 minutes, Kiet noticed Tai N., Tu N., and two other young males at another table. Kiet noticed that the males from the group were staring at him.

About five minutes later, Kiet's friends left, and Kiet remained at the table by himself. The males, including Tai and Tu, continued to stare at Kiet continuously, which caused Kiet concern. At some point within a half hour of Kiet's arrival, the other group left the cafe.

Lili approached Kiet and told him that someone outside wanted to talk to him; she then said, "[D]on't come out." When Kiet went outside the cafe, he saw a group of six or seven young (17-18 years old) Vietnamese males, including Tai and Tu. Kiet walked over to the group and asked (in Vietnamese) what they wanted. Someone then asked Kiet, "[A]re you Kiet, KON?" Kiet responded, "[Y]es, I am. . . . [W]hat do you guys want?" The group then "jumped" him. Kiet was punched by more than one person in the area between his face and stomach. He tried to block the punches by raising his hands to his face with his arms perpendicular to his body and his elbows together.

At the beginning of the attack, Kiet saw defendant behind the group pulling a stocking over his face. (Defendant was the only one of the attackers who concealed his identity.) Kiet testified that when he saw defendant pull the stocking over his face, "I knew I was gone. [¶] . . . [¶] Because I knew he [was] going to kill me." He saw a "shiny object," which he believed was metal, "pull[ed] out from [defendant's] pocket or something, just to the right of . . . where his waist [was]." Kiet observed defendant lunging toward him but did not actually see defendant hit him. He did not feel himself being stabbed at the time; he realized he had been stabbed when "[he] looked down and saw [his] guts falling out."

Kiet remained standing during the entire attack, which lasted approximately one minute. The attack ended when Kiet began running toward the entrance to the coffee shop. He had placed his hands over his stomach because of his injuries. Kiet was cognizant by this time of the severity of his wounds; he testified, "I knew I was dead." His attackers did not chase him; they were running in the opposite direction when Kiet last saw them. Kiet ran into the cafe, where he saw a friend, Hoang L., who asked Kiet who had attacked him. Kiet responded that "YA stabbed [him]."

Kiet was taken to the hospital, where he remained for an extended time (two weeks to one month). The police (Detective Jason Ta and Detective Shawny Williams) interviewed him in the hospital.

B. *Tai N.*

Tai N. was 16 years old at the time of the May 27, 2000 stabbing incident. Tai—like defendant—was originally charged with the attempted murder of Kiet, along with allegations that it was done willfully, deliberately, and with premeditation, and that it was done for the benefit of a criminal street gang.[3]

[3] Tai pleaded guilty to a charge of felony assault in connection with the stabbing. As part of his plea agreement, Tai agreed to testify in the trial against defendant fully and truthfully.

Tai belonged to YA and had a "YA" tattoo on his right arm. YA was started in 1998, and had five members (who had gone to school together)—Tai, defendant, Tu, Kim V., and Khoi. The other YA gang members had similar tattoos. Andy N. was not YA, although YA members were his friends.

YA had a problem with a rival gang, VK, that arose out of a fight on March 4, 2000, at a birthday party for Lili in which Tu stabbed a VK member. After this stabbing, there were problems between YA and KON because KON "backed up" VK in fighting, and members of VK and KON hung out together. As a result, YA also considered KON to be a rival gang.

On May 27, 2000, Tai met defendant, Tu, and Andy at the Dao Hong coffee shop. Tai and his friends sat at one table. Lili arrived at the cafe with Kiet, Huy, and Thai. Tai knew Kiet and Huy, and associated them with KON. Defendant was upset that Kiet and Huy had arrived with Lili, and defendant was staring angrily at Kiet and Huy.

Defendant went outside the coffee shop, and Tai followed him. Defendant told Tai that he was "pissed off" at Kiet and didn't like him. Defendant told Tai that he wanted to "jump" Kiet; while outside, defendant called for "backup" to assist him. He also told Tai that he planned to stab Kiet. Defendant showed Tai a silver pocket knife with a three-inch blade that he was carrying.

Defendant, Tai, Tu, and Andy waited outside the coffee shop. They made a plan to "jump" Kiet over a period of five to ten minutes. While they were outside, three or four male friends of defendant (18 to 20 years old) arrived; two of them got out of the car. Defendant, Tai, Tu, and Andy then moved away from the front of the coffee shop to the parking lot to avoid cameras that were at the shop. Tai went into the coffee shop. He asked Lili to pay for coffee—defendant had previously given Lili his wallet—and asked her to ask Kiet to come outside. Defendant had previously asked Tai to make this request to Lili. Tai then returned to his friends outside.

While waiting outside for Kiet, Tai observed defendant putting a sheer lady's stocking on his head (but not over his face), and then covering the stocking with his hat. Kiet came out of the shop and approached the group in the parking lot. Tai asked Kiet (in Vietnamese) if he was KON. Kiet responded that he was KON, and then one of defendant's other friends punched Kiet in the face. Kiet tried to run away but was unsuccessful; Tai and the original attacker continued to punch Kiet. The victim had no weapon, did not punch back, and tried to cover his face.

Tai observed defendant jump into the fight; he believes that he saw defendant strike Kiet. While he was punching Kiet, Tai was nearly stabbed by defendant, who was trying to stab Kiet. After about 10 to 15 seconds, the group ran away, defendant saying, "[L]et's rock, I stabbed a man." Later that day, the group that had attacked Kiet met at a school. Defendant told the group, "[D]amn . . . I can't believe I stabbed that guy."

Tai testified that the reason for the attack was that Kiet was KON, and that "[h]e and VK [were] together." Tai believed that Kiet's gang affiliation was the only reason for the attack.

C. *Lili H.*

Lili H. was dating Kim V. at the time of the May 27, 2000 incident. Kim had told her that he was a YA gang member. Through Kim, Lili met defendant, Tai, Tu, and Andy, and considered them all her friends.

Lili arrived at the coffee shop on May 27, 2000, with a group that included Thai (her best friend), Kiet, and Huy. She saw defendant, Tai, Tu, and Andy at the cafe, and sat at the table with them. Lili told defendant and Tu not to "mess with" Kiet because he was no longer KON. She did so to try to "[a]void the misunderstanding."

People from defendant's group went in and out of the cafe. Either defendant or Tai asked Lili to approach Kiet to tell him that they wanted to talk to him. She then told Kiet that her friends wanted to talk to him; she also told him that he should *not* go outside. Kiet said he would go outside to talk to her friends "because he was cool with

them." Lili tugged on Kiet's pants as he was trying to leave. She did so because she "was scared that something happened [*sic*]."

Within a week after the incident, Lili spoke with defendant over the telephone. Defendant told her that Kiet had claimed KON. Defendant would not tell her who had stabbed Kiet.

D. *Dr. Richard Kline*

Kiet Nguyen was brought by ambulance to San Jose Hospital. The trauma surgeon who treated Kiet, Dr. Richard Kline, testified that the victim had multiple stab wounds: in the right arm, in the right chest, in the abdomen (two), and in the back. There was also some evisceration. Dr. Kline considered several of the wounds life threatening. He presumed that the chest wound punctured the victim's lung and was potentially life threatening. One of the wounds to the abdomen passed through Kiet's liver and was life threatening. The other abdomen wound struck the mesentery vein,[4] which caused profuse bleeding.

Dr. Kline performed emergency surgery on Kiet. Because of massive bleeding, the victim had very low blood pressure, and there were times during the surgery that Dr. Kline thought that the victim would die. Kiet survived, but required three additional surgeries to address complications from the stab wounds.

E. *Detective Jason Ta*

Detective Jason Ta was the primary investigating officer. He interviewed defendant on May 30, 2000, after advising him of his *Miranda*[5] rights. Defendant at first denied being at the Dao Hong coffee shop on May 27, 2000. He later admitted being at the cafe but denied any involvement in the stabbing. Detective Ta also noted that

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[4] The mesentery vein brings blood back from the large bowel to the liver and into the venus system.

[5] *Miranda v. Arizona* (1966) 384 U.S. 436.

defendant had a cut right thumb, and that it appeared to be a fresh wound. He also interviewed Tai on several occasions concerning the stabbing. On July 3, 2002, Tai said that he had observed defendant stab Kiet three times.

The trial court qualified Detective Ta as an expert witness in the area of Vietnamese street gangs.[6] He testified that there are approximately 150 to 200 Vietnamese gangs in San Jose. The Vietnamese gangs have as few as three members, do not identify with particular colors, and do not have established territories.

Gang members choose Vietnamese coffee shops, Vietnamese billiards halls, and Vietnamese noodle houses as typical public hangouts. A high percentage (over 90 percent) of violent attacks between rival gang members occur at these three types of establishments. Nearly all of the Vietnamese coffee shops have surveillance cameras inside the premises; gang members thus moved outside at the time of violence in order to avoid having their crimes captured on tape. Detective Ta testified that Vietnamese gang members gain status from violent crimes. Generally, the people who are the leaders are those who "do the craziest thing[s]" or those who "in the minds of the other gang members . . . commit the more severe or serious assaults." Thus, a gang member who murders a rival gang member achieves the highest amount of credibility with his own gang and in the gang culture.

Detective Ta testified further that he was familiar with the 25 specified felonies under section 186.22, subdivision (e), and that "[a]ssaults, assaults with a deadly

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[6] Detective Ta had been court-qualified as an expert in the area of criminal street gangs in approximately six prior cases. He was born in Vietnam and was fluent in the Vietnamese language. Detective Ta had seven years of experience with the San Jose Police Department. At the time of trial, he was a gang detective, an assignment he had held for three years. Prior to that assignment, Detective Ta had been assigned to a task force of the Federal Bureau of Investigations providing undercover investigative work for Asian organized crime and Vietnamese gang activity. As a gang detective, he spent approximately 90 per cent of his time on cases with Vietnamese street gangs (approximately 450 cases, most of which within the City of San Jose). He had spoken to approximately 500 members of Vietnamese gangs in his investigation of crimes.

weapon," and attempted murder were among those specified crimes that were the primary activities of YA. One instance of YA criminal activity that Detective Ta cited was a stabbing of a VK gang member by a YA member that took place on March 4, 2000, at a birthday party for Lili H.[7] He also cited another instance of YA criminal activity: a May 9, 2000 incident in which a member of a rival gang (Nguio Viet) was stabbed multiple times by YA member Kim V. Kim was adjudicated as having committed an assault with a deadly weapon in that instance.

Gang expert Ta also opined that Kiet's stabbing was done for the benefit of, at the direction of, or in association with a criminal street gang. Detective Ta believed that all three of these alternative requirements were met. He opined further that the crime "was done with the specific intent to promote, further or assist in criminal conduct by gang members."

The stabbing of Kiet was done for the benefit of YA because the crime "was so heinous and it was so violent. It was done in broad daylight in the middle of the day when the coffee shop . . . and the parking lot [were] crowded." The stabbing was at defendant's direction and "was very well planned out"; defendant called for reinforcements, and the attack was committed away from the coffee shop to avoid video surveillance. Detective Ta's conclusion that the crime was gang-related was underscored by the fact that Kiet was asked to claim another gang immediately before being attacked. After the person being checked claims membership in a rival gang, the "checker" is then required to resort to violence because "[t]he whole reason for checking somebody is to basically show your dominance over them." This opinion was confirmed by the fact that, after the incident, defendant told Lili that Kiet was stabbed because he claimed KON.

III. *Defense Witnesses*

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[7] Lili H. corroborated Detective Ta's testimony, indicating that: Kim, Tai, and Tu were at the party; members of VK showed up at the party; there was a fight; and that one of the VK gang members was stabbed.

The defense called three witnesses—KON gang member Dien L., Detective Timothy Ahern, and Detective Shawny Williams. Each witness offered impeachment evidence concerning the victim, Kiet Nguyen. The evidence was to the effect that Kiet and two other KON members had been involved in a December 1999 drive-by shooting of a student, Nick A, a member of the Norteño gang. Kiet was the driver and the supplier of the gun. The student was not injured in the attack. Kiet admitted his role in the attack in an interview in April 2000 with Detective Williams.

PROCEDURAL BACKGROUND

Defendant was charged with the crime of attempted murder (§§ 664, subd. (a), 187), in connection with the attack on Kiet Nguyen occurring on May 27, 2000. Defendant was also charged with an enhancement that the crime of attempted murder was committed willfully, deliberately, and with premeditation under sections 664, 187, and 189. It was alleged further that defendant committed the crime for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further, and assist in criminal conduct by gang members. (§ 186.22, subd. (b)(1).)[8]

Defendant was also charged with the crime of assault with a deadly weapon (§ 245, subd. (a)(1)) in connection with the February 16, 2001 assault upon Nguyen N. at Juvenile Hall. Count 2 included allegations of personal weapon use (§§ 667, 1192.7), and the same gang enhancement alleged in count 1. Upon the People's motion, the court consolidated count 1 with count 2 for trial.

The trial commenced with in limine motions. The jury was empanelled on November 7, 2002. It returned its verdict on December 2, 2002: guilty as charged as to count 1, with true findings as to both special allegations; not guilty of assault with a

[8] The information charged defendant, Tai, and Tu with the same crime and the same enhancements. As noted in footnote 3, *ante*, Tai entered a guilty plea prior to defendant's trial. The record does not disclose the disposition of the charges against Tu.

deadly weapon as charged in count 2, but guilty of the lesser included misdemeanor offense of assault.

Defendant filed a posttrial motion (under § 1385, subd. (c)(1)) to strike the willful, deliberate, and premeditated enhancement for purposes of sentencing under the count 1 conviction. On April 15, 2003, after extensive argument, the court denied the section 1385 motion. At the same time, the court imposed a sentence upon defendant of 15 years to life as to count 1 (attempted murder with gang enhancement and willful, deliberate and premeditated enhancement). Defendant was given a concurrent term of six months in county jail for count 2 (misdemeanor assault). The court also ordered that defendant pay $5,000 as reimbursement for attorney's fees for his appointed attorney, pursuant to section 987.8, subdivision (b). Defendant filed timely a notice of appeal from the judgment.

DISCUSSION

I. *Sufficiency Of The Evidence Of Gang Enhancement*

A. *Contentions on appeal*

Defendant challenges the gang enhancement finding (§ 186.22, subd. (b)(1)) made by the jury. He claims that the evidence was insufficient as a matter of law to establish that YA was a "criminal street gang" because the prosecution did not establish that the commission of one or more predicate crimes was one of YA's "primary activities," as required under section 186.22(f). He argues that there was no evidence that YA engaged in criminal activity that was either "consistent" or "repeated."

The Attorney General responds that, giving proper deference to the judgment, there was sufficient evidence to support the jury's true finding with respect to the gang enhancement. The Attorney General argues that the Legislature did not prescribe a minimum number of predicate crimes that must be committed in order to satisfy the

"primary activities" requirement under section 186.22(f).[9] Further, the Attorney General asserts that the predicate crimes relied upon by Detective Ta were assaults with a deadly weapon, which are enumerated crimes under section 186.22, subdivision (e).

B. *"Primary Activities" requirement*

The Street Terrorism Enforcement and Prevention Act (STEP Act) was enacted by the Legislature in 1988. (§ 186.20 et seq.) Its express purpose was "to seek the eradication of criminal activity by street gangs." (§ 186.21.) One of the components of the STEP Act is a sentence enhancement provision for crimes committed "for the benefit of, at the direction of, or in association with any criminal street gang." (§ 186.22, subd. (b)(1).)

A gang sentence enhancement under section 186.22 must be based upon "substantial evidence . . . support[ing a] finding of the existence of a 'criminal street gang' whose members engage in a 'pattern of criminal gang activity.' [Citations.]" (*In re Jose T.* (1991) 230 Cal.App.3d 1455, 1462.) Section 186.22(f), defines "criminal street gang" for purposes of determining the appropriateness of a gang sentencing enhancement, as follows: "[A]ny ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, of [section 186.22,] subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity."

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[9] At page 51 of respondent's brief, the Attorney General states: "There is no evidence in the record that YA had as its primary purpose the commission of crimes designated in [section 186.22,] subdivision (e)." We assume—as noted in defendant's reply brief—that this is a significant typographical error and not a concession by the Attorney General.

Therefore, the "criminal street gang" component of a gang enhancement requires proof of three essential elements: (1) that there be an "ongoing" association involving three or more participants, having a "common name or common identifying sign or symbol"; (2) that the group has as one of its "primary activities" the commission of one or more specified crimes; and (3) the group's members either separately or as a group "have engaged in a pattern of criminal gang activity." (*People v. Gardeley* (1996) 14 Cal.4th 605, 617 (*Gardeley*).) Defendant's challenge here concerns only the "primary activities" element of the gang enhancement.

Three years ago, the California Supreme Court was called upon to construe the "primary activities" element of section 186.22(f). In *People v. Sengpadychith* (2001) 26 Cal.4th 316 (*Sengpadychith*), the court explained: "The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the group's members. . . . 'Though members of the Los Angeles Police Department may commit an enumerated offense while on duty, the commission of crime is not a *primary activity* of the department. Section 186.22 . . . requires that one of the primary activities of the group or association itself be the commission of [specified] crime[s] . . . . Similarly, environmental activists or any other group engaged in civil disobedience could not be considered a criminal street gang under the statutory definition unless one of the primary activities of the group was the commission of one of the [25] enumerated crimes found within the statute.' " (*Id.* at pp. 323-324, quoting *People v. Gamez* (1991) 235 Cal.App.3d 957, 970-971, disapproved on another ground in *Gardeley*, *supra*, 14 Cal.4th at p. 624, fn. 10.)

The court noted further that "[s]ufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute." (*Sengpadychith*, *supra*, 26 Cal.4th

at p. 324.) It held further that the "primary activities" element might also be satisfied by expert testimony of the type found in *Gardeley*, *supra*, 14 Cal.4th 605, where a police gang expert testified[10] that the defendant's gang "was primarily engaged in the sale of narcotics and witness intimidation, both statutorily enumerated felonies. [Citation.]" (*Sengpadychith*, *supra*, 26 Cal.4th at p. 324.)

"Evidence of past or present conduct by gang members involving the commission of one or more of the statutorily enumerated crimes is relevant in determining the group's primary activities." (*Sengpadychith*, *supra*, 26 Cal.4th at p. 323.) Such evidence alone, however, is "[n]ot necessarily" sufficient to establish the "primary activities" requirement. (*Ibid*.) Indeed, "evidence sufficient to show only *one* offense [enumerated under section 186.22, subdivision (e)] is not enough." (*In re Jorge G.* (2004) 117 Cal.App.4th 931, 945; see also *People v. Perez* (2004) 118 Cal.App.4th 151 [beating six years before subject crime and four shootings less than a week before the subject crime held insufficient to establish predicate crimes were one of "primary activities" of gang].)

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[10] Of course, because the culture and habits of gangs are matters which are "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact" (Evid. Code, § 801, subd. (a)), opinion testimony from a gang expert, subject to the limitations applicable to expert testimony generally, is proper. (*Gardeley*, *supra*, 14 Cal.4th at pp. 617-620.) Such an expert—like other experts—may give opinion testimony that is based upon hearsay, including conversations with gang members as well as with the defendant. (*Sengpadychith*, *supra*, 26 Cal.4th at p. 324; *Gardeley*, *supra*, at p. 620.) Such opinions may also be based upon the expert's personal investigation of past crimes by gang members and information about gangs learned from the expert's colleagues or from other law enforcement agencies. (*Sengpadychith*, *supra*, at p. 324; *Gardeley*, *supra*, at p. 620.) Expert testimony of such a nature has also been held sufficient to satisfy the "primary activities" element of section 186.22(f) in *People v. Duran* (2002) 97 Cal.App.4th 1448, 1465 (*Duran*); *People v. Galvan* (1998) 68 Cal.App.4th 1135, 1138; and *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370. (See also *People v. Killebrew* (2002) 103 Cal.App.4th 644, 656-657 [discussing various gang issues that California courts have recognized as proper subjects for expert testimony].)

Thus, for instance, in one case, the defendants challenged a true finding on a gang enhancement in connection with two robbery counts. (*Duran*, *supra*, 97 Cal.App.4th 1448.) Defendants claimed, inter alia, that there was insufficient evidence to support this finding because the gang expert's testimony that "the gang's primary activity was 'putting fear into the community,' [described] an activity not listed as one of the statutorily enumerated criminal offenses." (*Id.* at p. 1464.) The court rejected this challenge. (*Id.* at pp. 1465-1466.) It concluded that there was sufficient evidence that one of the gang's "primary activities" was the commission of one or more of the statutorily enumerated offenses because the gang expert's "testimony supported a jury finding that members of the [gang] were engaged in more than the occasional sale of narcotics, robbery, or assault. [The gang expert] testified that the [gang] members engaged in these activities 'often,' indeed often enough to obtain 'control' of the narcotics trade in a certain area of Los Angeles. Evidence of the [charged] robbery and [a gang member's prior] conviction [for felony possession of cocaine base for sale] further corroborated [the expert's] testimony, providing specific examples of [gang] members' commission of robbery and narcotics offenses. We conclude the evidence was sufficient to support the jury's true finding on the section 186.22 gang enhancement." (*Ibid*.)

C. *Standard of review*

In determining whether the evidence is sufficient to support a conviction or an enhancement, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; see also *People v. Johnson* (1980) 26 Cal.3d 557, 578.) Under this standard, "an appellate court in a criminal case . . . does not ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt." (*Woodby v. INS* (1966) 385 U.S. 276, 282.) Rather, the reviewing court "must review the whole record in

the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson*, *supra*, at p. 578.) This standard applies to a claim of insufficiency of the evidence to support a gang enhancement. (*People v. Ortiz* (1997) 57 Cal.App.4th 480, 484.)

D. *Discussion*

In following *Sengpadychith*, *supra*, 26 Cal.4th 316, we review the record to determine whether there was substantial evidence upon which the jury could have concluded that "the commission of one or more of the statutorily enumerated crimes [was] one of [YA's] 'chief' or 'principal' occupations." (*Id.* at p. 323.) The evidence here was that the YA gang had been in existence for a period of approximately two years. No evidence was presented that YA committed any of the 25 predicate crimes enumerated in section 186.22, subdivision (e) in either 1998 or 1999. There were, however, three predicate crimes—including the attack upon Kiet[11]—that were committed by YA over a short period of time in 2000.

The prosecution identified a felony assault occurring on March 4, 2000 (i.e., stabbing of VK member by a YA member), as one criminal act. Detective Ta—who was highly qualified as an expert on the subject of Vietnamese gangs—testified that YA (Kim) committed another assault with a deadly weapon in May 2000. The third YA criminal act was the attempted murder of Kiet by defendant charged as count 1. While

[11] The Supreme Court in *Sengpadychith* resolved a prior conflict between two appellate districts concerning whether acts committed at the time of the charged offense (including the charged offense itself) may be used to establish the "primary activities" element of the gang enhancement. The court decided that both past crimes *and* "the *present* or charged offense" may be considered "in deciding whether the group has one of its primary activities the commission of one or more of the statutorily listed crimes." (*Sengpadychith*, *supra*, 26 Cal.4th at p. 323.)

defendant challenges the inclusion of attempted murder as a predicate crime, we disagree.[12] Furthermore, even were defendant's argument to have merit, it would be of no consequence; plainly, the crime committed by Tai N. (felony assault) in the same attack upon the victim, Kiet, is an enumerated offense which can be considered for a "primary activities" element of the gang enhancement statute. (See § 186.22, subd. (e)(1).)

Viewing the evidence "in the light most favorable to the prosecution" (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 319), we find that it is sufficient to satisfy the "primary activities" prong of section 186.22(f). The evidence here shows the existence of three serious, violent crimes by YA gang members that took place over a period of less than three months. Significantly, two YA stabbings of rival gang members preceded the charged crime by only 12 weeks.

Defendant urges us to look at the entire two-year period of YA's existence in order to conclude that the gang did not "*consistently and repeatedly*" engage in predicate criminal acts. (*Sengpadychith*, *supra*, 26 Cal.4th at p. 324.) Under the circumstances presented here, however, we reject defendant's invitation to essentially "spread out" the predicate crimes over YA's entire existence. Instead, we, find the existence of three violent felonies by a gang as small as YA over less than three months to be sufficient to satisfy the "primary activities" element. Stated otherwise, the fact that YA's level of criminal activity lay dormant for most of its existence does not preclude a finding that it was a gang under the enhancement statute, where there was evidence of consistent and repeated criminal activity during a short period before the subject crime.[13]

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[12] This issue is addressed more fully in connection with our review of defendant's challenge to the gang enhancement instruction. (See discussion in part II, *post*.)

[13] Defendant relies upon the recent case, *People v. Perez*, *supra*, 118 Cal.App.4th 151, in support of his claim that there was insufficient evidence to support a "primary activities" finding under the gang enhancement statute. *Perez* is factually distinguishable and is not controlling. In *Perez*, the defendant was a member of a Latino

Furthermore, proof of the "primary activities" element was satisfied through testimony by a police gang expert, Detective Ta. He gave significant expert testimony that YA was engaged in criminal actions that constituted predicate crimes under the gang statute. (See *Sengpadychith*, *supra*, 26 Cal.4th at p. 324.)

We therefore conclude that there was sufficient evidence to support the jury's finding that YA—as one of its "primary activities"—engaged in one or more predicate crimes under section 186.22(f), and that YA was thus a "criminal street gang."

II. *Gang Enhancement Instruction*

The court instructed the jury regarding gang enhancement, utilizing CALJIC No. 17.24.2. Defendant contends that the court erred in its inclusion of attempted murder as a predicate crime for the jury's determination of the "primary activities" prong of the enhancement charge. The Attorney General responds that attempted murder was, indeed, a predicate crime that may properly be considered in determining the "primary activities" element of the gang enhancement. We are aware of no reported cases that have expressly held that attempted murder is a predicate crime that may be utilized for the "primary activities" prong of the gang enhancement statute. Several appellate courts, however, have accepted without comment the inclusion of attempted murder as a "primary activities" crime in the particular cases before them. (See, e.g., *People v. Perez*, *supra*,

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gang, East Side Longos, consisting of over 300 persons. (*Id.* at p. 157.) There was other evidence that defendant may have been a member of an affiliated gang, CLB, which had approximately 20 members. (*Ibid.*) Besides the subject shooting of a youth by defendant, the only predicate crime that the evidence clearly showed was committed by either such gang was an attempted murder of another youth six years earlier. (*Ibid.*) The prosecution cited the shootings of four youths less than one week before the subject crime in support of the "primary activities" prong of the gang enhancement. The evidence that defendant's gang (or a gang affiliated with defendant's gang) committed these four shootings, however, was equivocal at best. In contrast, here, the three predicate crimes used to establish the "primary activities" element were indisputably committed by defendant's gang, YA.

118 Cal.App.4th 151; *People v. Galvan, supra*, 68 Cal.App.4th 1135.) We conclude that the instruction was proper.

It is clear that, in order to show "a pattern of criminal activity" under subdivision (e) of section 186.22, the fact finder may consider the commission of one of the 25 enumerated offenses *as well as the attempted commission of such crimes*. (§ 186.22, subd. (e).) Thus, the attempted (but unsuccessful) commission of any of the 25 crimes enumerated under subdivision (e) would constitute a predicate crime to show "a pattern of criminal activity" under that subdivision.

Defendant argues, however, that only the *successful commission* of one or more of the 25 enumerated crimes may be utilized to find that the crime or crimes constitute(s) one (or more) of the "primary activities" of a group under section 186.22(f). We disagree. Subdivision (f) refers to the criminal acts enumerated in subdivision (e); the latter subdivision includes "the commission of, the attempted commission of, conspiracy to commit, or solicitation of" the 25 enumerated crimes. (§ 186.22, subd. (e).)

If we were to take defendant's argument to its logical extreme, then a group that committed *numerous* crimes of *attempted* murder *could not* qualify as a criminal street gang under the "primary activities" requirement of section 186.22(f), simply because the crimes did not result in the victims' deaths. The fact that the violent gang is one "that couldn't shoot straight"[14] should not of itself exempt it from being a criminal street gang. Given the Legislature's expressed intent to eradicate criminal street gangs,[15] we seriously

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[14] See Breslin, The Gang That Couldn't Shoot Straight (1969).

[15] "The Legislature hereby finds and declares that it is the right of every person . . . to be secure and protected from fear, intimidation, and physical harm caused by the activities of violent groups and individuals. . . . [¶] . . . [T]he State of California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods. . . . It is the intent of the Legislature in enacting this chapter to seek the eradication of criminal activity by street gangs by focusing upon patterns of criminal

doubt that the STEP Act was intended to apply only to violent street gangs who are successful in committing their intended crimes, while ignoring similarly violent but unsuccessful gangs.

Since section 186.22(f) refers to the crimes enumerated in subdivision (e), it logically follows that the attempted commission of such crimes should satisfy both the "primary activities" requirement under subdivision (f) and the "pattern" requirement under subdivision (e). We therefore conclude that the trial court did not err in giving the challenged instruction.[16]

III. *Pinpoint Instruction Concerning Intent To Kill*[*]

A. *Contentions on appeal*

Defendant submitted two "pinpoint" instructions[17] concerning his defense that he did not have the specific intent to kill the victim required for the crime of attempted

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gang activity and upon the organized nature of street gangs, which together, are the chief source of terror created by street gangs." (§ 186.21.)

[16] We acknowledge that there are some anomalies between subdivisions (e) and (f) of section 186.22 with respect to the definition of predicate crimes for determining "pattern of criminal activity" and the "primary activities" element of a criminal street gang, respectively. As noted, however, we do not believe that it was the Legislature's intent to exempt members of street gangs from punishment under the STEP Act simply because their gang was unsuccessful in its felonious criminal activity.

[*] See footnote, *ante*.

[17] Tailored instructions take at least two forms: (1) an instruction that "pinpoints evidence in the case in light of the defense theory and instructs the jury that the prosecution bears the burden of ultimate persuasion on that issue. . . . [¶] [and (2) a]n *amplifying* instruction [that] remedies the failure of a general instruction to adequately define or instruct on the elements charged. [Citations.]" (Cal. Criminal Law: Procedure and Practice (Cont.Ed.Bar 7th ed. 2004) § 32.7, p. 888.) We will adopt for convenience the term "pinpoint instruction"—a term used by the parties—to address the intent to kill instruction that defendant claims was improperly refused by the trial court.

murder. The court granted defendant's request as to one instruction[18] and denied it as to the second.

The refused pinpoint instruction was as follows: "In deciding whether the prosecutor has proved beyond a reasonable doubt that the defendant had the specific intent to kill or has failed to prove that he had this intent you may consider the following: [¶] Any statement made by the defendant prior to the stabbing; [¶] The extent of any injury sustained by the victim; [¶] Whether the defendant had a reasonable opportunity to inflict greater injury; [¶] The circumstances which surrounded the defendant ceasing any assault; [¶] Any steps taken by the defendant to encourage other persons to continue or stop any assault; [¶] Any statement made by the defendant after the assault; [¶] Any other factor which you believe shows that the defendant did nor did not have the intent to kill." In its refusal of this instruction, the trial court indicated that it was "[d]efense oriented and a list of such considerations would be exhausting." Defendant's counsel advised the court that he had invited the prosecutor "to set forth any other considerations that he thought would be proper to put in that instruction." The court responded, "Noted."

Defendant contends that it was error for the trial court to refuse this second "intent to kill" instruction. He argues—citing, inter alia, *People v. Wharton* (1991) 53 Cal.3d 522, 570 (*Wharton*)—that he was entitled to this requested instruction because it pinpointed a theory of his defense, i.e., intent to kill as a critical element of the attempted murder count. He argues further that the proposed instruction was founded

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[18] The pinpoint instruction given by the trial court was as follows: "To prove the crime alleged in Count 1 of the information, attempted murder, the Prosecution must prove beyond a reasonable doubt that the defendant had the specific intent to kill. If, after considering all the evidence, you conclude that the defendant did an intentional act, the natural consequences of which were dangerous to human life, the act was deliberately performed with knowledge of the danger to, and with conscious disregard for human life, but you are not convinced beyond a reasonable doubt that when he did this act he had the specific intent to kill, you must find the defendant not guilty of the crime of attempted murder and/or attempted voluntary manslaughter also."

upon the evidence, and was not argumentative. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1137 (*Wright*).)

The Attorney General acknowledges that the trial court must give a pinpoint instruction requested by defendant when it properly addresses a theory of the case. The Attorney General argues that a pinpoint instruction should be refused, however, where it invites a jury to draw favorable inferences from specified evidence and/or unduly emphasizes one or more factors for the jury to consider. In essence, the response to defendant's position is that an argumentative or otherwise slanted pinpoint instruction must be rejected by the court.

B. *Pinpoint instructions, generally*

"A criminal defendant is entitled, on request, to a[n] instruction 'pinpointing' the theory of his defense. [Citations.] . . . [H]owever, instructions that attempt to relate particular facts to a legal issue are generally objectionable as argumentative (*Wright*, *supra*, [45 Cal.3d] at p. 1137), and the effect of certain facts on identified theories 'is best left to argument by counsel, cross-examination of the witnesses, and expert testimony where appropriate.' [Citation.]" (*Wharton*, *supra*, 53 Cal.3d at p. 570, quoting *Wright*, *supra*, at p. 1143.)

The impropriety of pinpoint instructions that select certain facts is based upon the Supreme Court's disapproval "of 'the common practice [of] select[ing] certain material facts, or those which are deemed to be material, and endeavoring to force the court to indicate an opinion favorable to the defendant as to the effect of such facts, by incorporating them into instructions containing a correct principle of law,' . . . 'An instruction should contain a principle of law applicable to the case, expressed in plain language, indicating no opinion of the court as to any fact in issue.' [Citations.]" (*Wright*, *supra*, 45 Cal.3d at p. 1135, quoting *People v. McNamara* (1892) 94 Cal. 509, 513, fn. omitted.)

Thus, a proper pinpoint instruction may contain a "listing of [appropriate] factors to be considered by the jury . . . . The instruction should list the applicable factors in a neutral and nonargumentative instruction . . . [and] should list only factors applicable to the evidence at trial, and should refrain from being unduly long or argumentative." (*Wright*, *supra*, 45 Cal.3d at p. 1143, fn. omitted.) Conversely, a pinpoint instruction is improper where it "invite[s] the jury to draw inferences favorable to only one party from the evidence presented at trial." (*People v. Carter* (2003) 30 Cal.4th 1166, 1225; see also *People v. Earp* (1999) 20 Cal.4th 826, 886-887 [court properly rejected "plainly argumentative" pinpoint instructions that emphasized specific evidence defendant claimed raised reasonable doubt].)

The party proponent must make a request for a pinpoint instruction; the court has no duty to give such an instruction sua sponte. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119.) Pinpoint instructions have been approved for a variety of defense theories. For instance, a neutral pinpoint instruction describing various factors to consider in evaluating an eyewitness identification issue is appropriate. (*Wright*, *supra*, 45 Cal.3d at pp. 1139, 1141.) Likewise, an instruction relating intoxication to any mental state is another approved pinpoint instruction. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1014.) Such an instruction is required to be given upon request when there is evidence supportive of the theory. (*People v. Saille*, *supra*, at p. 1119.) It was held error to refuse a defendant's pinpoint instruction requiring the jury to consider whether there was a sufficient cooling period after provocation such that defendant did not act in the heat of passion, where there was evidence that provocation occurred over an extended period of time. (*Wharton*, *supra*, 53 Cal.3d at pp. 569-571.) Further, where a defendant relied on a defense of third party culpability and there was evidence to support it, a pinpoint instruction that evidence of flight by a third party may be relevant to the issue of reasonable doubt was appropriate. (*People v. Henderson* (2003) 110 Cal.App.4th 737, 741.)

C. *No error*

The trial court did not err in refusing defendant's second "intent to kill" pinpoint instruction. It is, of course, elemental that the crime charged in count 1—attempted murder—requires proof of "the specific intent to kill." (*People v. Lee* (2003) 31 Cal.4th 613, 623.) The claimed lack of specific intent to kill was a very material aspect of the theory of the defense. Indeed, defendant seemingly conceded that the People had proved that he had planned to beat up or stab the victim and that defendant did, indeed, stab Kiet. The court accommodated the defense by giving the first proposed pinpoint instruction that emphasized that the prosecution had the burden of proving beyond a reasonable doubt that defendant had the specific intent to kill the victim.

Our Supreme Court has advised that "*Wright's* approval of detailed jury instructions on factors bearing upon eyewitness identification . . . does not signal our approval of equally detailed instructions on every issue to come before a criminal jury." (*People v. Daniels* (1991) 52 Cal.3d 815, 871.) "In a proper instruction, '[w]hat is pinpointed is not specific evidence as such, but the *theory* of defendant's case. [Citation.]" (*Wright*, *supra*, 45 Cal.3d at p. 1137.) A pinpoint instruction may be rejected where it is repetitious of other instructions given to the jury (*id.* at p. 1134), or is too long. (*Id.* at p. 1144.)

Here, while the proposed instruction was not unduly long, it contained a noninclusive list of only six evidentiary matters to consider with respect to the intent to kill element. The lengthy recitation of facts, *ante*, demonstrates that the list of factors could have included numerous other considerations, which *would have made* the instruction too long, or (in the words of the trial court) "exhausting." Moreover, the proposed instruction was potentially repetitious since there were a number of other instructions given by the court that overlapped the matters contained in the proposed

pinpoint instruction.[19] (See also *People v. Daniels*, *supra*, 52 Cal.3d at pp. 870-871 [trial court properly rejected pinpoint instruction concerning premeditation and deliberation, where "such matters can be addressed in argument without aid of a specific instruction"].)

We therefore conclude that the trial court did not err in its refusal of defendant's second proposed pinpoint instruction concerning the intent to kill.

IV. *Failure To Give Assault With Deadly Weapon Instruction*[*]

A. *Contentions on appeal*

Defendant made a timely request that the court give an instruction concerning assault with a deadly weapon (§ 245, subd. (a)(1)) as an uncharged offense related to the charges in count 1. The prosecution opposed the request, asserting that California does not permit the court to instruct the jury on uncharged related offenses, absent the stipulation of the prosecution. The court agreed with the prosecution and denied defendant's request.

Defendant claims that it was error for the trial court to refuse this instruction concerning the uncharged offense of assault with a deadly weapon (related-offense instruction). As a result (defendant complains), the jury was given an "all or nothing" choice of finding defendant guilty of attempted murder or attempted voluntary manslaughter, on the one hand, or acquittal, on the other hand.

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[19] These instructions given by the court included the jury being advised regarding: (a) circumstantial evidence (under CALJIC Nos. 2.00 and 2.01); (b) the sufficiency of circumstantial evidence to prove specific intent (under CALJIC No. 2.02); (c) the requirement that the conduct and specific intent of the perpetrator operate jointly (under CALJIC No. 3.31) in order to establish the crime charged in count 1 or the gang enhancement; and (d) the elements of attempted murder. (CALJIC No. 8.66). As to the latter instruction, the court advised the jury that the specific intent to kill was one of the elements that was required to be proved beyond a reasonable doubt to convict defendant of attempted murder.

[*] See footnote, *ante*.

Defendant acknowledges that he was not charged in count 1 with assault with a deadly weapon. He agrees that assault with a deadly weapon is a lesser related offense—not a lesser included offense—to attempted murder. (*People v. Woods* (1991) 226 Cal.App.3d 1037, 1050-1051; *In re David S.* (1983) 148 Cal.App.3d 156, 158-159.) Further, defendant concedes that, under *People v. Birks* (1998) 19 Cal.4th 108 (*Birks*), a defendant is not entitled as a matter of right to instructions on an uncharged lesser related offense.

Defendant contends nonetheless that the related-offense instruction should have been given because his theory at trial was that defendant did not intend to kill the victim, and thus "the jury could find him guilty of felony assault." Defendant argues that the rationale behind the holding in *Birks*—that the prosecution may be prejudiced because evidence supporting a lesser related offense may not become known until the middle of trial (*Birks*, *supra*, 19 Cal.4th at p. 129)—did not support the refusal of the related-offense instruction in this instance. Here, defendant asserts, the prosecution was well aware before trial of the fact that the evidence supported the lesser related charge of assault with a deadly weapon.[20]

Defendant argues further that the prosecution is deemed to have consented to the related-offense instruction because the court, at the prosecution's request, instructed the jury that it could find defendant (as an aider and abettor) guilty of attempted murder "*based on* his guilt of 'the crime of assault with a deadly weapon.' "[21] In light of this

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[20] Indeed, the prosecution initially charged defendant under section 245, subdivision (a)(1), in juvenile court. Further, Tai N.—defendant's co-gang member who testified against him at trial—pleaded guilty to a charge of assault with a deadly weapon.

[21] The trial court instructed the jury as follows: "In order to find [the] defendant guilty of the crime of attempted murder as charged in Count One, you must be satisfied beyond a reasonable doubt that: [¶] 1. The crime of assault with a deadly weapon was committed; [¶] 2. That the defendant aided and abetted that crime; [¶] 3. That a co-principal in that crime committed the crime of attempted murder; and [¶] 4. The crime of

instruction, defendant argues that the prosecution's objection at trial to the related-offense instruction was "disingenuous." Finally, for the same reasons, defendant argues that the prosecution was estopped from objecting to the related-offense instruction.

Naturally, the Attorney General disagrees with defendant's contentions, stating that under *Birks*, *supra*, 19 Cal.4th 108, the trial court properly refused defendant's related-offense instruction since the prosecution did not consent to it. The Attorney General argues that *Birks* plainly applies, and that the absence here of one of the policy considerations underlying *Birks*—unfairness to the prosecution—does not justify ignoring the holding in *Birks*.

B. *Discussion concerning refused assault instruction*

In *Birks*, *supra*, 19 Cal.4th 108, the Supreme Court reexamined the correctness of its prior holding in *People v. Geiger* (1984) 35 Cal.3d 510 (*Geiger*). The court in *Geiger* had held that "a defendant has a state constitutional right to instructions on uncharged lesser offenses, supported by the evidence, which are *not* necessarily included in the charged offense but merely bear some relationship thereto." (*Birks*, *supra*, 19 Cal.4th at p. 119.) Fourteen years later in *Birks*, the Supreme Court overruled *Geiger*, concluding that it had "represent[ed] an unwarranted extension of the right to instructions on lesser offenses." (*Birks*, *supra*, at p. 112.)

As noted, defendant argues against application of *Birks* because its rationale—potential unfairness to the prosecution from a requirement that the court instruct, upon a defense request, on lesser related, uncharged offenses—is not present here. We reject this position.

The court's holding in *Birks* was broad-based. The Supreme Court's reasons were not limited to the "fairness to prosecution" ground selected here by defendant. Other

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attempted murder was a natural and probable consequence of the commission of the crimes [*sic*] of assault with a deadly weapon."

rationale for the *Birks* court overruling its prior decision were that *Geiger*: (1) caused uncertainty in its implementation by the courts, particularly in determining whether a particular uncharged offense was "related" to the crime actually charged under the facts of the particular case[22] (*Birks*, *supra*, 19 Cal.4th at pp. 130-131 & p. 131, fn. 16); (2) "afford[ed] the defense a superior right at trial to determine whether the jury will consider a lesser offense alternative, or instead will face an all-or-nothing choice between conviction of the stated charge and complete acquittal" (*id.* at p. 128); (3) "interfere[d] in particular with a role traditionally accorded to the People alone, the responsibility to determine the charges" (*id.* at p. 130); (4) was not followed in most jurisdictions (*id.* at p. 133, fn. 17); and (5) presented "a serious question . . . whether such a right [of the defense to require instruction for an uncharged related offense] can be reconciled with the separation of powers clause" in the California Constitution. (*Id.* at p. 134.)

We conclude that the trial court did not err by refusing defendant's request for an instruction concerning the uncharged offense of assault with a deadly weapon. The prosecution did not agree that the instruction could be given, and there is no basis for concluding that it consented to it implicitly and/or was estopped from objecting to the instruction. *Birks* is plainly applicable to the circumstances presented in this case. Defendant's argument—that we read *Birks* as proscribing a related-offense instruction requested by defendant and objected to by the prosecution *only where* giving it would be unfair to the prosecution—is untenable. There is no basis for construing *Birks* in the narrow manner that defendant suggests.[23]

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[22] The *Birks* court acknowledged with approval the United States Supreme Court's reasoning in *Schmuck v. United States* (1989) 489 U.S. 705, 720-721, that lesser included offenses—as compared with related offenses—are much more certain of definition and application by the courts. (*Birks*, *supra*, 19 Cal.4th at p. 130.)

[23] Indeed, were we to hold *Birks* inapplicable to the facts presented here, we would violate the Supreme Court's admonishment that "[t]he Court of Appeal must follow, and has no authority to overrule, the decisions of this court. [Citation.]" (*Birks*, *supra*,

V. *Motive Instruction (CALJIC No. 2.51)*[*]

A. *Contentions on appeal*

Defendant asserts error because the court gave a standard motive instruction to the jury. The challenged instruction reads as follows: "Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty." (CALJIC No. 2.51 (2004 ed.).)

Defendant contends that the effect of this instruction was to reduce the prosecution's burden of proof. His argument is that CALJIC No. 2.51 does not specifically advise that proof of motive alone is insufficient to establish guilt. By reference to other instructions given by the trial court that *specifically stated* that single, specific circumstances were *not* sufficient to establish guilt,[24] the reading of CALJIC No. 2.51—defendant argues—implied to the jury that it could infer guilt simply from a

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19 Cal.4th at p. 116, fn. 6, citing *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

[*] See footnote, *ante*.

[24] Defendant cites six instructions in support of this argument: (a) "[t]he fact of a conviction does not necessarily destroy or impair a witness's believability" (CALJIC No. 2.23); (b) "[t]he fact that the witness engaged in past criminal conduct . . . does not necessarily destroy or impair a witness's believability" (CALJIC No. 2.23.1); (c) "flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt" (CALJIC No. 2.52); (d) the "[m]ere presence at the scene of a crime" and the "[m]ere knowledge that a crime is being committed and the failure to prevent it" do "not amount to aiding and abetting" (CALJIC No. 3.01); (e) "[e]vidence that a person was in the company of or associated with one or more other persons alleged or proved to have been members of a conspiracy is not, in itself, sufficient to prove that person was a member of the alleged conspiracy" (CALJIC No. 6.13); and (f) "[e]vidence of the commission of an act which furthered the purpose of an alleged conspiracy is not, in itself, sufficient to prove that the person committing the act was a member of the alleged conspiracy." (CALJIC No. 6.18.)

finding of motive. He argues that the motive instruction was "startlingly anomalous" in light of the context of the other instructions that stressed that single factors alone were insufficient to establish guilt.

B. *Discussion of motive instruction*

We are not persuaded by defendant's argument. Last year, the Supreme Court rejected a challenge to CALJIC No. 2.51. (See *People v. Snow* (2003) 30 Cal.4th 43 (*Snow*).) In *Snow*, the defendant argued that the giving of CALJIC No. 2.51 was improper because the jury was not cautioned that "proof of motive alone was insufficient to establish guilt." (*Snow, supra,* at p. 97.) The court rejected this challenge, noting that the instruction specifically advised "the jury that motive [was] not an element of the crime charged (murder) and need not be shown, which leaves little conceptual room for the idea that motive could establish *all* the elements of murder." (*Id.* at p. 98; see also *People v. Cash* (2002) 28 Cal.4th 703, 738-739 [giving of motive instruction did not relieve prosecution of obligation of proving intent to rob where "instructions as a whole did not use the terms 'motive' and 'intent' interchangeably"].)

In *People v. Petznick* (2003) 114 Cal.App.4th 663 (*Petznick*), we recently rejected an argument identical to the one made here. In *Petznick*, the defendant challenged his conviction, inter alia, on the basis that "by giving of the standard language of CALJIC No. 2.51 the trial court confused the jury by suggesting that motive alone could establish guilt and effectively lowered the prosecution's standard of proof." (*Id.* at p. 684.) Mirroring the argument here, the defense in *Petznick* argued: " '[I]n context' the instruction as given somehow suggested that motive alone *was* sufficient to establish guilt. Defendant points out that the court instructed the jury about the significance of different circumstantial evidence such as association with coconspirators, possession of stolen property, and flight after crime, among others. Defendant argues that all these instructions include the warning that evidence of each alone is not sufficient to establish

guilt but that no such admonition is included in the motive instruction and thus, it is 'startlingly anomalous' in context." (*Id.* at p. 685.)

We rejected this argument, citing, inter alia, the Supreme Court's decision in *Snow*, *supra*, 30 Cal.4th 43. (*Petznick*, *supra*, 114 Cal.App.4th at pp. 684-685.) We noted that, while the motive instruction was similar in some respects to other instructions that defendant cited, CALJIC No. 2.51 was "given for the additional purpose of clarifying that motive is not an element of a crime. . . . CALJIC No. 2.51 points out that motive (unlike intent) need not be proved. Considering that the instruction is different in this way from the instructions to which defendant refers, there is nothing particularly startling or anomalous about the fact that it is phrased differently than the others. [¶] Although the instruction informs the jury that motive could tend to show that defendant was guilty, the balance of the instructions made it clear that in order to prove the crimes charged all of the elements of each crime must be proved. Since CALJIC No. 2.51 very plainly establishes that motive is not an element of the crimes, it is hard to imagine how a jury might conclude that motive alone would be sufficient to establish guilt. In light of the instructions as a whole it is not reasonably probable the jury would have understood the instruction as defendant urges." (*Petznick, supra,* at p. 685.)

Based upon *Snow*, *supra*, 30 Cal.4th 43, and our holding in *Petznick*, *supra*, 114 Cal.App.4th 663, we conclude that the jury was properly instructed here regarding motive; CALJIC No. 2.51 could not reasonably be construed as having misled the jury to believe that it could infer defendant's guilt based upon the mere presence of motive. Defendant's claim of error is without merit.

VI. *Cumulative Prejudice From Instructional Error*[*]

Defendant contends that the three instructional errors—refusal to give "intent to kill" pinpoint instruction, refusal of instruction of uncharged offense of assault with a

[*] See footnote, *ante*.

deadly weapon, and the giving of the motive instruction—had the cumulative effect of denying him a fair trial. We have previously rejected each of defendant's three claims of instructional error. (See parts III through V, *ante*.) Thus, since no error occurred, there is no prejudice, cumulative or otherwise.

VII. *Motion To Strike Willful, Deliberate, And Premeditated Enhancement*[*]

Defendant moved the trial court for an order striking the willful, deliberate, and premeditated enhancement for purposes of sentencing under section 1385.[25] The court denied the motion. Defendant contends that this was error because the trial judge did not appreciate that he had the discretion to strike the enhancement for purposes of sentencing, notwithstanding the jury's true finding on the enhancement. Defendant cites portions of the record—wherein the court noted that there was sufficient evidence to support the jury's true finding with respect to the enhancement—in support of his argument that the court believed it did not have discretion to strike the enhancement in sentencing defendant.

The Attorney General acknowledges that the trial court had the discretion under section 1385 to strike the willful, deliberate, and premeditated enhancement. Such discretion is vested in the trial court under the authority of *People v. Marsh* (1984) 36 Cal.3d 134, 142-144, which held similarly that the trial court had the discretion under section 1385 to strike certain enhancements to a kidnapping offense penalty provisions under section 209 constituting additional punishment.[26] The Attorney General asserts,

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[*] See footnote, *ante*.

[25] Section 1385, subdivision (a), provides in part as follows: "The judge or magistrate may, either of his or her own motion or upon application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed." Section 1385, subdivision (c)(1) provides: "If the court has the authority pursuant to subdivision (a) to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice in compliance with subdivision (a)."

[26] Section 209, as quoted by the court in *People v. Marsh*, *supra*, 36 Cal.3d at pages 143-144, footnote 7, read at the time as follows: "(a) Any person who seizes,

however, that the trial court did not abuse its discretion, arguing that the record reflects that the trial judge was aware that he had the discretion to strike the enhancement but declined to do so because of the particular facts of the case.

We review rulings on section 1385 motions to strike an enhancement for abuse of discretion. (See *People v. Myers* (1999) 69 Cal.App.4th 305, 309-310 [rulings on motions to strike prior convictions reviewed "under the deferential abuse of discretion standard"].) Under this standard, defendant "must demonstrate that the trial court's decision was irrational or arbitrary." (*Ibid.*) Since the basis for his claim of error is that the trial court was under the misapprehension that it did not have the discretion to strike the enhancement under section 1385, defendant has the burden on appeal "to affirmatively demonstrate that the trial court misunderstood its sentencing discretion." (*People v. Davis* (1996) 50 Cal.App.4th 168, 172.)

Defendant here has not established that the trial court misunderstood its sentencing discretion under section 1385. The court indicated as an introduction to its remarks that it: had read the entire file; presided over the trial; was familiar with all of the evidence; had read and considered the probation report and a psychologist's report;[27] and had

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confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or to exact from another person any money or valuable thing, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall be punished by imprisonment in the state prison for life without possibility of parole in cases in which any person subjected to any such act suffers death or bodily harm, or is intentionally confined in a manner which exposes such person to a substantial likelihood of death, or shall be punished by imprisonment in the state prison for life with the possibility of parole in cases where no such person suffers death or bodily harm. [¶] (b) Any person who kidnaps or carries away any individual to commit robbery shall be punished by imprisonment in the state prison for life with possibility of parole."

[27] The report—attached to defendant's section 1385 motion—was by Ubaldo Sanchez, Ph.D. It was based upon interviewing and testing of defendant that took place in December 1999, five months before defendant's attack upon the victim.

entertained arguments from both counsel. After noting that the jury had found that the attempted murder was premeditated, it concluded that the victim would have died but for the swift actions of paramedics and physicians; it emphasized Dr. Kline's testimony regarding the nature of the victim's injuries, the manner in which they had been inflicted, and the emergency procedures necessary to save the victim's life. The court concluded from a review of all of the evidence that there was "nothing in the evidence or the report of Dr. Sanchez that decays or vacates the ability of the defendant to form the mental intent actually on the issue of premeditation."

The trial judge expressed his view that the crime was premeditated. He noted that the attack was planned, that defendant gathered several members, that he prepared for the attack, wore a mask, and employed a ruse to lure the victim into the parking lot. The court noted further that defendant applied deadly force, stabbed the victim several times, and then fled with his confederates, leaving the victim to bleed in the parking lot.[28] Defendant's actions—the court opined—were, among other things, "cowardly."

Defendant argues, however, that the trial court's emphasis that premeditation was "the correct ruling of the jury" and was strongly supported by the evidence indicates that the court did not understand its role in deciding whether to strike the enhancement under section 1385. We disagree. This is not a case where the trial court clearly expressed an erroneous belief that it had no discretion to grant the motion to strike under section 1385. (See *People v. Metcalf* (1996) 47 Cal.App.4th 248, 252 [case remanded for resentencing "[s]ince the trial court affirmatively indicated, and erroneously believed, that it had no

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[28] Defendant argues that the trial court misapprehended the facts, citing the court's statement that defendant and the others "left the victim lying in the parking lot in his last moments possibly of his life." Defendant is correct that there was no evidence that Kiet Nguyen ever left his feet during the attack. We conclude, however, that the court's statement that the victim was left "lying" where he was attacked was either meant figuratively, or, if meant literally, was a mistake that is de minimis in the context of our evaluation of defendant's claim that the court abused its discretion.

discretion to stricke [*sic*] a prior offense"]; *People v. Sotomayor* (1996) 47 Cal.App.4th 382, 390, 391 [same].) Indeed, after the motion was denied, defense counsel clarified that he was not arguing that there was insufficient evidence to support the jury's true finding that defendant's commission of the crime was willful, deliberate, and premeditated; instead, he advised that he was requesting that the court exercise its discretion by striking the enhancement in connection with defendant's sentencing. The court acknowledged defense counsel's statement.

We conclude that the court did not abuse its discretion under section 1385 by denying defendant's motion to strike the willful, deliberate, and premeditated enhancement for purposes of sentencing. We therefore reject defendant's claim of error.

VIII. *Imposition Of Counsel Fees*[*]

Defendant challenges the court's order requiring defendant to pay $5,000 in attorney's fees. He argues that the court erred in imposing these fees because it did not give defendant advance notice, hold a hearing, or make a determination of defendant's ability to pay, all as required under section 987.8, subdivision (b). Defendant cites *People v. Flores* (2003) 30 Cal.4th 1059, in support of his position that this reimbursement order is invalid. The Attorney General responds that *Flores* is inapplicable, because defendant in this instance was put on notice that attorney's fees might be awarded.[29] We conclude from the record before us that the award of attorney's fees must be reversed.

Section 987.8, subdivision (b), provides in relevant part: "In any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial

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[*] See footnote, *ante*.

[29] The notice (the Attorney General argues) was provided in the probation report, which stated: "NOTE: Attorney fees if appropriate."

court . . . the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof. . . . The court may, in its discretion, order the defendant to appear before a county officer designated by the court to make an inquiry into the ability of the defendant to pay all or a portion of the legal assistance provided." Under the statute, defendant must be afforded the following rights: (1) to be heard in person; to present witnesses and other evidence; (2) to confront and cross-examine witnesses; (3) to have the evidence against him or her disclosed; and (4) to written statement of the court's findings. (§ 987.8, subd. (e).)

Although the court did not make a determination of defendant's ability to pay all or a portion of his legal cost, during the sentencing hearing, it noted: "However, all fines and fees are subject to review by the Department of Revenue and any other agency based on . . . the defendant's ability to pay, and will be adjusted accordingly." The Attorney General argues that this statement demonstrated the court's compliance with section 987.8, subdivision (b), and Government Code section 27712,[30] which allows the court to

[30] Government Code 27712, subdivision (a), provides in part as follows: "In any case in which a party is provided legal assistance, either through the public defender or private counsel appointed by the court, upon the conclusion of the proceedings . . . after a hearing on the matter, the court may make a determination of the ability of the party to pay all or a portion of the cost of such legal assistance. Such a determination of ability to pay shall only be made after a hearing conducted according to the provisions of Section 987.8 of the Penal Code, except that, in any court where a county financial evaluation officer is available, the court shall order the party to appear before the county financial evaluation officer, who shall make inquiry into the party's ability to pay this cost as well as other court-related costs. The party shall have the right to dispute the county financial evaluation officer's evaluation, in which case he or she shall be entitled to a hearing pursuant to [Government Code] [s]ection 27752. If the party agrees with the county financial evaluation officer's evaluation, the county financial evaluation officer shall petition the court for an order to that effect. . . . If the court determines, or upon petition by the county financial evaluation officer is satisfied, that the party has the ability to pay all or part of the cost, it shall order the party to pay the sum to the county in any installments and manner which it believes reasonable and compatible with the party's ability to pay."

order that the determination of ability to pay be made by a "county financial evaluation officer." We acknowledge that these statutes permit a court to order the defendant to appear before a financial officer to inquire regarding defendant's ability to pay for his or her legal assistance. Nothing the Attorney General has presented as part of the record before us, however, allows us to determine whether the court properly exercised its power to refer the question of defendant's ability to pay to a financial officer. Absent that, what we have before us is a trial court ordering the reimbursement of $5,000 in attorney's fees without making a determination of defendant's ability to pay, as required by section 987.8, subdivision (b).

Because defendant was sentenced to prison, there was a statutory presumption that he did not have the ability to pay for his defense. (See § 987.8, subd. (g)(2)(B) [defendant sentenced to prison has no "reasonably discernible future financial ability to reimburse" defense costs, "[u]nless the court finds unusual circumstances"].) Here, the Attorney General has pointed to no "unusual circumstances" that would rebut this presumption that the defendant here—sentenced to prison—lacked the financial ability to reimburse his defense costs.

Because the record discloses neither that the court made the requisite determination of defendant's ability to pay, nor any facts upon which such a conclusion could have been made, we will strike the order directing defendant to reimburse attorney's fees in the amount of $5,000.

DISPOSITION

The order directing defendant to pay $5,000 in attorney fees pursuant to section 987.8 is hereby stricken. The trial court is directed to prepare an amended abstract of judgment and forward a certified copy of the amended abstract to the Department of Corrections. As modified, the judgment is affirmed.

Walsh, J.*

WE CONCUR:

Rushing, P.J.

Premo, J.

People v. Vy
No. H025873

* Judge of the Santa Clara County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Trial Court:	Santa Clara County Superior Court No. CC092402
Trial Judge:	Hon. Robert I. Ambrose
Attorney for Defendant and Appellant: (Under appointment by the Court of Appeal)	Stephen Greenberg
Attorneys for Plaintiff and Respondent:	BILL LOCKYER Attorney General ROBERT R. ANDERSON Chief Assistant Attorney General GERALD A. ENGLER Senior Assistant Attorney General STAN HELFMAN Supervising Deputy Attorney General JOHN R. VANCE, Jr. Deputy Attorney General

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